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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MONICA TENESACA DELGADO, also known as
MONICA PATRICIA TENESACA DELGADO,

Petitioner,

v.

MICHAEL B. MUKASEY,
Attorney General of the United States,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Immigration and Nationality Act provides that an alien who has entered the United States without having been admitted or paroled is eligible to adjust status to that of a lawful permanent resident if he or she is the beneficiary of an immigrant visa filed on or before April 30, 2001. 8 U.S.C. 1255(i). The Act has also provided since 1997 both that an alien who has been removed from the United States and has returned without permission is inadmissible, 8 U.S.C. 1182(a)(9)(C)(i), and that the Attorney General may reinstate the prior removal order. 8 U.S.C. 1231(a)(5). Section 1182(a)(9)(C)(ii) provides that an alien who has been removed and has returned unlawfully is ineligible to apply for readmission for a period of ten years following his or her last departure; however, the Attorney General promulgated, and has retained unaltered, regulations providing that he may grant nunc pro tunc ("now for then") permission to reapply for admission to make the prior unlawful entry lawful if the alien is eligible to adjust status under 8 U.S.C. 1255(i). 8 C.F.R. 212.2(e) and (i). After considering 8 U.S.C. 1255(i) and 8 C.F.R. 212.2, Petitioner, who had been removed and had returned without permission, applied for adjustment of status and permission to reapply for admission nunc pro tunc. The Attorney General refused to consider the applications and reinstated her removal order.

The questions presented are:

1. Can the Board of Immigration Appeals repeal by adjudication a regulation that the Attorney

General himself has chosen not to repeal since 8 U.S.C. 1182(a)(9)(C)(i) and 8 U.S.C. 1231(a)(5) were enacted twelve years ago?

2. If not, must the Attorney General's designees adhere to the clear language of a regulation that was promulgated for the benefit of the public and upon which Petitioner relied?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Second Circuit dismissing Petitioner's petition for review is reported at Tenesaca Delgado v. Mukasey, 516 F.3d 65 (2d Cir. February 7, 2008) and is reproduced at App. 1a-18a.

The decision of the Department of Homeland Security ("DHS") denying Petitioner's application for adjustment of status to lawful permanent resident pursuant to § 245 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1255, is unreported. Matter of Tenesaca Delgado, File A76 838 388 (October 26, 2006). App. 19a-26a.

The decision of the United States Court of Appeals for the Second Circuit denying Petitioner's petition for panel rehearing and suggestion for rehearing en banc is unreported. Tenesaca Delgado v. Mukasey, No. 06-5035-ag (2d Cir. May 9, 2008). App. 27a-28a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit denied Petitioner's petition for review on February 7, 2008. It denied Petitioner's petition for rehearing and suggestion for rehearing en banc on May 9, 2008. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. § 1254(1). While Petitioner's case involves an application for relief from removal, review is not barred by INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) because the questions presented herein are "questions of law raised upon a petition for

review." INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D).

STATUTUTORY AND REGULATORY PROVISIONS INVOLVED

The following relevant portions of Title 8 of the Code of Federal Regulations are reproduced at App. 29a-31a: 8 C.F.R. § 103.2(a); 8 C.F.R. § 212.2(e), 8 C.F.R. § 1212.2(e); and 8 C.F.R. § 212.2(i)(2), 8 C.F.R. § 1212.2(i)(2).

The following relevant sections of the INA and United States Code ("U.S.C.") are reproduced at App. 31a-38a: INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A); INA § 212(a)(9)(C), 8 U.S.C. § 1182(a)(9)(C); INA § 241(a)(5), 8 U.S.C. § 1231(a)(5); INA § 245(a), 8 U.S.C. § 1255(a); and INA § 245(i), 8 U.S.C. § 1255(i).

The following relevant portions of the Administrative Procedure Act are reproduced at App. 38a-41a: 5 U.S.C. § 553 and 5 U.S.C. § 706.

STATEMENT OF THE CASE

This case involves whether an administrative agency can ignore the clear intent of the Secretary (here the Attorney General) where the Secretary has promulgated an unambiguous regulation for the benefit of the public. 8 C.F.R. § 212.2 ("212.2")[1]

[1] 8 C.F.R. § 212.2 is the Department of Homeland Security's Regulation. The Attorney General has a corresponding regulation, 8 C.F.R. § 1212.2. Both regulations, entitled

allows a limited number of aliens previously removed to seek nunc pro tunc permission to reapply for admission from within the United States, while a section of the INA, 212(a)(9)(C)(i)(II), 8 U.S.C. 212(a)(9)(C)(i)(II), at least potentially, precludes aliens who enter or attempt to enter the United States after removal from requesting permission to reapply until they have remained outside the United States for ten years. Petitioner asserts that she relied upon 212.2 to her detriment and that the Board of Immigration Appeals ("BIA") must give it effect; the BIA cannot repeal the Attorney General's regulation through adjudication. If the Attorney General wishes to change or repeal the regulation, he must do so through formal rule making.

This case also involves INA § 212(a)(9)(A), 8 U.S.C. 212(a)(9)(A), the implementing statute for 212.2; subsection 212(a)(9)(A)(iii), which allows the Attorney General to waive the five year bar for admission after deportation; and INA § 245(i), 8 U.S.C. 1255(i), which allows a closed class of aliens who entered without inspection but who had immigrant visa petitions on file by April 30, 2001 to pay an additional $1,000 fee to remain with their family by adjusting their status to that of a lawful permanent resident.[2] Also at issue is whether INA §

"Consent to reapply for admission after deportation, removal or departure at Government expense", are identical, and the plain language binds both the Department of Homeland Security and the Board of Immigration Appeals. For consistency with the Second Circuit's decision, 212.2 will be referred to herein.

[2] Aliens who had immigrant visa petitions on file as of April 30, 2001, are considered to be "grandfathered". Section 1255(i)

241(a)(5), 8 U.S.C. § 1231(a)(5), providing for reinstatement of a prior order of removal, is applicable to Ms. Delgado. Specifically, the issue is whether the Government must first follow its unambiguous regulation to make a discretionary determination whether a 1255(i) applicant should be granted permission to reapply for admission nunc pro tunc from within the United States. This would give effect to the regulation and section 1231(a)(5). Both inside and outside of the immigration context, therefore, the question presented is one and the same: whether an agency is bound by its unambiguous regulation.

This case presents the question whether the BIA has the authority to overrule the Attorney General. The Government does not dispute that the Attorney General has not repealed 212.2, nor could it. Rather, the Government argues that its own regulation does not apply to Ms. Delgado because of changes made to the INA twelve years ago by the Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996) ("IIRIRA").

In opposing the implementation of its regulation, the Government has taken inconsistent positions in each court of appeals that has addressed the issue. Its only consistent position – that its own regulation need not be followed - however, is flatly contradicted by controlling Supreme Court precedent. See United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 265-67 (1954).

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expired on April 30, 2001, but grandfathered aliens remain eligible to adjust status under its provisions.

Petitioner's view is that the Government's approach on this issue is directly contrary to the position that it has taken in the courts of appeals and before this Court on every other similar issue. Indeed, as a litigant in the court of appeals and before this Court, the Government consistently treated its regulations as legal authority within the discretion of the Attorney General. In those cases, the Government has repeatedly used its regulations as a shield (to defend its position) or as a sword (to take an affirmative action). However, here it inexplicably asks us to totally disregard its regulation. Petitioner contends that when the Government takes inconsistent positions on a case by case basis, it is impossible for the public to know how to comport with the regulations.

Petitioner Monica Patricia Tenesaca Delgado ("Petitioner" or "Ms. Delgado") argued that nunc pro tunc permission to reapply for admission to the United States pursuant to the express language and long held application of 8 C.F.R. §§ 212.2(e) ("212.2(e)") and (i)(2) ("212.2(i)(2)") (together, "212.2(e) and (i)(2)") would retroactively cure her inadmissibility and allow her to adjust her status to that of a legal permanent resident. Because Ms. Delgado would no longer be considered an illegal entrant after removal, INA §§ 212(a)(9)(C)(II) and 241(a)(5) would no longer be implicated. This construction of 212.2 would harmonize the regulation with 8 U.S.C. 1255(i) and 8 U.S.C. 1182(a)(9)(C)(II). The regulation would apply only to grandfathered applications under 1255(i). See supra n. 2. Anyone who did not have an immigrant visa

petition filed on or before April 30, 2001, would be subject to section 1182(a)(9)(C)(II), as would anyone denied permission to reapply for admission in the exercise of the Attorney General's discretion.

The Government argued that Ms. Delgado is inadmissible under section INA § 212(a)(9)(C)(II) for having reentered after removal and that Ms. Delgado was not eligible for an I-212 waiver as a matter of law because it could only be filed after she remained outside of the United States for ten years. The Government's position, that purported recidivist violators are not entitled to nunc pro tunc relief, is contradicted by the plain language and history of its own regulations, which clearly contemplate the adjustment of individuals who have unlawfully entered the United States following a prior deportation. The Government primarily relied upon Matter of Torres-Garcia, 23 I. & N. Dec. 866 (BIA 2006), which is unpersuasive authority because it ignored its own instructions, regulations *and* case precedents, let alone local circuit law, Supreme Court law and the basic principles of administrative law (i.e. Administrative Procedure Act sections 553 and 706). Although the BIA in Matter of Torres-Garcia acknowledged that 212.2 allowed a 1255(i) alien to seek retroactive permission to reapply from within the United States, it overstepped its authority and determined that the regulation should no longer be utilized because of changes to the INA made by the IIRIRA. The Government also argued that in Fernandez-Vargas v. Gonzales, 126 S.Ct. 2422 (2006), this Court held that the filing of a waiver of inadmissibility pursuant to Form I-212, in conjunction with an application for adjustment of

status, does not preclude DHS from reinstating a prior order of removal. However, the issues raised by Ms. Delgado were neither raised nor addressed in Fernandez-Vargas. In fact, in Fernandez-Vargas, the Court stated that despite the express terms of the reinstatement provision at 241(a)(5), certain regulatory provisions left open the possibility that relief from removal is available even when the reinstatement statute is invoked. See Fernandez-Vargas, 126 S.Ct. at 2426, n. 4.

A. Jurisdiction of the Court of Appeals

The Court of Appeals had jurisdiction over Petitioner's petition for review pursuant to INA § 242(a)(1), 8 U.S.C. § 1252(a)(1), which provides for judicial review of a final order of removal.

B. Facts

Petitioner was born on April 5, 1981 in Ecuador. Her mother left her when she was three years old and came to the United States. She never knew her father because he disappeared soon after her birth. Ms. Delgado was raised initially by her aunt and then her grandparents when her aunt left for the United States in 1991. On January 24, 1997, Ms. Delgado's step-father filed a visa petition for her, which grandfathered her under 1255(i). In April 1999, her aunt visited her in Ecuador and, on May 5, 1999, at the age of eighteen, she and her aunt landed at Houston International Airport. Her aunt presented to immigration officials the valid residence card of her 13 year old daughter and represented that Ms. Delgado was the person identified in the

photograph. Although Ms. Delgado thought the consequences were only that immigration officials had sent her back to Ecuador, an immigration official also executed an expedited removal order entirely in English without informing Ms. Delgado.[3] (R. 10).

Learning that her mother was seriously ill, and wanting to know her mother, in early December 2000, at the age of nineteen, Ms. Tenesaca crossed the Mexican border without inspection and has since continually resided in the United States.[4] On January 8, 2006, Ms. Delgado married a United States citizen. Prior to and subsequent to that marriage, Ms. Delgado and her U.S. citizen husband consulted attorneys regarding her immigration status and, through investigation, learned about Ms. Delgado's expedited removal order. However, because Ms. Delgado is a grandfathered alien under 1255(i), counsel determined, based upon the Government's forms, instructions and regulation at 212.2, that a retroactive waiver would cure all her inadmissibilities and allow her to adjust her status to that of a legal permanent resident. On July 11 2006, counsel filed the necessary applications and Ms. Delgado paid a total of $2,295 in filing fees, including a $1,000 penalty fee to adjust her status from within the United States.

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[3] An expedited removal order is a ministerial act performed by an immigration official rather than an immigration judge.

[4] Ms. Delgado remains in the United States on supervised release.

On October 26, 2006, Ms. Delgado appeared at Citizenship and Immigration Services for an interview. The District Adjudications Officer had a prepared denial waiting. In it, the Officer denied both Ms. Delgado's request for permission to reapply for admission after removal and her application for adjustment of status because the request to reapply had been filed from within the United States. 19a-26a. Two officers from Immigration and Customs Enforcement immediately arrested Ms. Delgado and reinstated her expedited removal order. 19a-26a.

C. Procedural History

Petitioner filed a timely petition for review. The Second Circuit denied it on February 7, 2008. Tenesaca Delgado v. Mukasey, 516 F.3d 65 (2d Cir. 2008); App. 1a-18a. On May 9, 2008, the Second Circuit denied Ms. Delgado's petition for panel rehearing and suggestion for rehearing en banc. App. 27a-28a.

ARGUMENT FOR ALLOWING THE WRIT

1. The decision of the Court of Appeals in this case is contrary to the holdings of this Court. This Court's intervention is therefore necessary to remind circuit courts that agencies must follow their unambiguous regulations and to ensure consistency, efficiency, and justice in the application of the nation's administrative laws.

The procedural circumstances of this case should not have been unusual: A 1255(i) alien follows the DHS's publicly available forms, instructions and

regulations that allow her to apply to adjust her status to that of a lawful permanent resident. The regulations allow the Attorney General to make a discretionary determination as to whether permission to reapply is granted, a favorable determination of which would then allow the alien's adjustment of status application to be adjudicated on the merits. The Attorney General routinely made these determinations after Congress enacted the IIRIRA; prior to the terrorist attacks of September 11, 2001; and prior to the creation of the Department of Homeland Security on February 28, 2003. The Government now refuses to make this discretionary determination as to Ms. Delgado, despite the Government having conceded the viability of the regulation in circuit courts as late as 2005 (Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004), *motion to reconsider denied*, Perez-Gonzalez v. Gonzales, 403 F.3d 1116 (9th Cir. 2005) and Berrum-Garcia v. Comfort, 390 F.3d 1158 (10th Circuit 2004)); despite the Attorney General having updated his regulations in accordance with IIRIRA; despite post-1996 changes and proposals to the subject regulation but not to subsection (c) or (i)(2); despite nothing having been posted in the Federal Register about proposed changes to subsection (c) or (i)(2); despite maintaining the regulation unchanged when the Department of Homeland Security was created; despite not listing those previously removed as ineligible for 1255(i) adjustment when the program was extended on November 26, 1997, and on December 1, 2000; and without any other change in the law indicating that 212.2 was no longer valid.

Rather than considering both the history and plain language of 212.2(e), the BIA speculated that the Attorney General in fact intended to change the regulation, but did not. 23 I. & N. Dec. at 875. The Second Circuit affirmed the power of the BIA, whose authority is limited to that delegated by the Attorney General, to restrict the Attorney General's power to consider and grant requests pursuant to his regulation at 212.2(e); that is, the decision below affirmed the BIA's authority to repeal by adjudication a regulation that the Attorney General himself declined to repeal through rule-making.

The Second Circuit's decision has implications and consequences that reach far beyond immigration law because it allows all agencies to ignore their own regulations. Since 1942, Supreme Court law has consistently held that administrative agencies are bound to follow their regulations (see Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 422 (1942)) (holding that agencies are bound to follow regulations on which individuals justifiably rely); see also United States v. Nixon, 418 U.S. 683, 696 (1974) ("so long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and enforce it."). Since 1954, the Supreme Court has held so under immigration law (see United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 265-67 (1954) and Morton v. Ruiz, 415 U.S. 199, 235 (1974)) (both holding that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.").

Thus, although Ms. Delgado's petition for certiorari raises a question that applies to an ever-dwindling class,[5] the Court should intervene because the Second Circuit's decision conflicts with this Court's case law pertinent to all areas of administrative law.

2. This case also raises a question of fair notice. Ms. Delgado and her attorney looked to the regulations to determine how the agency treats adjustment of status applications from similarly situated individuals. Relying on the clear language of 8 C.F.R. 212.2(e) and (i)(2); on the instructions on the Form I-212, which by regulation have the force of

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[5] Section 1255(i) allows aliens who are physically present in the United States, but have not been admitted or paroled, to apply for adjustment of status to that of lawful permanent residence. Section 1255(a) allows aliens to apply for adjustment of status if they have been either admitted or paroled. Because 212.2(e) and (i)(2) apply only to aliens who have returned without permission, they also apply only to the limited class of aliens seeking adjustment of status under 1255(i). Adjustment applicants applying under section 1255(a) have been admitted or paroled; thus, they had permission to enter the country. The class of 1255(i) is growing smaller because 212.2(e) applies only to aliens in the United States who returned after being deported or removed, and who are otherwise eligible for adjustment of status under 8 U.S.C. 1255(i). "Otherwise eligible for adjustment of status" does not mean that the applicant would be eligible but for the unlawful reentry. The BIA holds that permission to reapply for admission may be granted nunc pro tunc "where the alien would receive a grant of adjustment of status in conjunction with the grant of any appropriate waivers of inadmissibility." Matter of Roman, 19 I. & N. Dec. 855, 859 (BIA 1988). While 1255(i) expired in 2001, aliens for whom an immigration visa petition was filed on or before April 30, 2001, were "grandfathered" and remain eligible.

regulations, see 8 C.F.R. 103.2(a)(1) (instructions on forms are incorporated into the regulations); and on information in the Adjudicator's Manual, counsel filed affirmative applications on behalf of Ms. Delgado and her U.S. citizen spouse. Chapter 43.1 of the Adjudicator's Manual governing "Consent to Reapply After Deportation or Removal" states:

> While the statute requires that consent must be obtained before the date of the alien's reembarkation at a place outside the U.S. or attempt to be readmitted from contiguous territory," precedent decisions and long-established practice have allowed for *nunc pro tunc* (or "now for then") approval...If the application is granted *nunc pro tunc*, the approval is retroactive to the date on which the alien reembarked for the U.S. or sought admission from Canada or Mexico." INS Adj. Field Manual 43.1.

The Adjudicator's Field Manual section entitled "23.5 ADJUSTMENT OF STATUS UNDER SECTION 245 OF THE INA" states under subsection (3) which is entitled "Concurrent Filing of Adjustment Applications and Waiver Applications": "Be aware that you can accept and process adjustment applications concurrently with applications for waivers....as well as applications for permission to reapply after deportation or removal." INS Adj. Field Manual 23.5. Ms. Delgado reasonably expected the agency to adhere to its regulations; hence, she applied for permission to reapply for admission nunc pro tunc. An

interpretation of the regulation that is contrary to the clearly expressed intent of the regulation, particularly in light of the Form I-212 and its instructions, and the Adjudicator's Manual, violated the Fifth Amendment's Due Process Clause's notice requirement.

3. The Second Circuit's decision also results in a split in the circuits. Unlike the Second Circuit, the Eighth Circuit held that 8 C.F.R. 212.2 allows the Government to grant an application for permission to reapply for admission nunc pro tunc, and that would take him out of the realm of 8 U.S.C. 1182(a)(9)(C). Lopez v. Flores v. DHS, 387 F.3d 773, 775-777 (8th Cir. 2004) (remanding the case to the BIA for a discretionary determination on the applicant's I-212 waiver because its approval retroactively cancels the disqualifying effect of the prior deportation....to escape his apparent statutory ineligibility).

Subsequent to the Second Circuit's decision, the Sixth Circuit, without referencing 212.2, and after considering the holding in Torres-Garcia, remanded the case to the BIA to consider retroactively granting the alien's application for adjustment of status. Ramirez-Canales v. Mukasey, 517 F.3d 904, 910-911 (6th Cir. 2008). The Sixth Circuit recognized that the BIA has long used nunc pro tunc orders to retroactively legalize an alien's admission into the United States thereby eliminating the grounds for deporting the alien:

> The immigration judge denied Ramirez-Canales relief *nunc pro tunc*....because

> the Attorney General has no discretion to waive violations of § 1182(a)(9)(C)(i). However, the relief sought by Ramirez-Canales is of a different nature. He requests that the court grant his application for adjustment of status retroactively – which would have the effect of undoing his subsequent violation of § 1182(a)(9). In that case, no waiver would be required because there would be no violation to waive. Id.

The Second Circuit also held that adjustment of status is unavailable when a prior removal order is reinstated pursuant to INA § 241(a)(5), 8 U.S.C. § 1231(a)(5). Such finding, however, conflicts with the Eighth Circuit's holding, the explicit language of 212.2(e) and (i)(2), and the long held interpretation the Government has given it post-IIRIRA.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2007

Docket No. 06-5035-ag

Argued: October 30, 2007 Decided: February 7, 2008

MONICA TENESACA DELGADO, a/k/a MONICA PATRICIA TENESACA DELGADO,

Petitioner-Appellant,

v.

MICHAEL B. MUKASEY,[1] Attorney General of the United States,

Respondent-Appellee.

Before: MINER and POOLER, Circuit Judges.[2]

Appeal from an October 26, 2006 decision by the United States Immigration & Customs Enforcement ("ICE") reinstating, in accordance with INA § 241(a)(5), 8 U.S.C. §

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[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), United States Attorney General Michael B. Mukasey is automatically substituted for former Attorney General Alberto R. Gonzales as respondent-appellee in this case.

[2] The Honorable Thomas J. Meskill, who was a member of this panel, passed away before oral argument. The appeal is being decided by the remaining two members of the panel, who are in agreement. See 2d Cir. Interim R. 0.14(b).

1231(a)(5), an order of removal against petitioner-appellant, a native and citizen of Ecuador, following determinations that petitioner-appellant was not admissible because she had entered the United States without permission after having been removed, that no waiver is available for such inadmissibility, and that she was ineligible for any exception because ten years had not passed since she departed the United States and she did not seek permission to be admitted before she reentered.

Petition for review denied.

MATTHEW L. GUADAGNO (Jules E. Coven, Kerry W. Bretz, on the brief), Bretz & Coven, LLP, New York, NY, for Petitioner.

ZOE HELLER (Peter D. Keisler, Assistant Attorney General, Terri J. Scadron, Assistant Director, Joshua Braunstein, on the brief) Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, DC, for Respondent.

MINER, Circuit Judge:

Petitioner Monica Tenesaca Delgado, a native and citizen of Ecuador, petitions this Court for review of an October 26, 2006 decision by the United States Immigration & Customs Enforcement ("ICE") reinstating a prior order of removal against her. Earlier on the same date that the ICE issued its decision, the United States Citizenship and Immigration Services ("CIS") denied Delgado's application to adjust her status to that of a lawful permanent resident and denied her application for a waiver of her ineligibility for admission to the United States. The CIS found that Delgado was ineligible for adjustment of her status to that of a lawful permanent resident ("adjustment of status") because she had

entered the United States without permission after having been removed. The CIS further found that no waiver was available for such inadmissibility and that Delgado did not meet the requirements, set forth in INA § 212(a)(9)(C)(ii), 8 U.S.C. § 1182(a)(9)(C)(ii), for the exception because ten years had not passed from the date of Delgado's last departure from the United Status and she did not seek permission for readmission before she reentered. After issuing its decision, the CIS immediately notified the ICE of its decision as well as Delgado's prior removal. The ICE then issued a decision reinstating the prior order of removal against Delgado because she had entered the United States without permission after having been removed previously. Delgado challenges the decision by the ICE.

For the reasons that follow, Delgado's petition for review is denied.

BACKGROUND

I. Introduction

Delgado, a native and citizen of Ecuador, first attempted to enter the United States on May 5, 1999, at Houston International Airport, Houston, TX, by fraudulently presenting herself as a returning resident alien. Delgado displayed a visa belonging to her cousin, who also bore the surname Tenesaca Delgado. Delgado was placed in expedited removal proceedings and was returned to Ecuador on the same day, May 5, 1999. In December 2000, Delgado reentered the United States without inspection. Due to her previous removal and illegal reentry, Delgado is ineligible for admission to the United States ("inadmissible"), as she concedes, pursuant to INA § 212(a)(9)(C)(i)(II), 8 U.S.C. § 1182(a)(9)(C)(i)(II). Section 1182(a)(9)(C)(i)(II) provides that aliens who "enter[] or attempt[] to reenter the United

States without being admitted" and have previously been "ordered removed" are inadmissible to the United States.

On January 8, 2006, Delgado married a United States citizen. On July 11, 2006, counsel for Delgado filed a visa petition (Form I-130) by Delgado's husband on Delgado's behalf. Counsel also filed forms applying for adjustment of status (Forms I-485, I-485A), seeking a waiver for Delgado's inadmissibility due to her presentation for fraudulent documents on May 5, 1999 (Form I-601), and seeking a waiver, pursuant to 8 C.F.R. § 212.2(e), for her inadmissibility due to her reentry without permission after having been removed (Form I-212). On September 28, 2006, Delgado's application for employment authorization (Form I-765) was approved. On October 26, 2006, Delgado appeared at the office of the CIS in New York City, New York for an interview with a District Adjudications Officer for the purpose of adjudicating her applications for adjustment of status and for permission to reapply for admission. The CIS denied: (1) Delgado's application for adjustment of status; (2) her application for a waiver, pursuant to 8 C.F.R. § 212.2(e), of her inadmissibility due to her reentry without permission after having been removed; and (3) her application for a waiver of her inadmissibility due to the fraud she committed in her first attempt to enter the United States. The CIS determined that Delgado was inadmissible pursuant to INA § 212(a)(9)(C)(i)(II), 8 U.S.C. § 1182(a)(9)(C)(i)(II) because she had reentered the United States without permission after having been removed, that no waiver is available for such inadmissibility, and that Delgado did not meet the requirements for the exception that would allow her to be admitted. The requirements are that ten years pass from the time of the alien's latest departure from the United States and that permission to reenter be sought prior to reentry. On that same date, the District Adjudications Officer notified the ICE of its decision as well as Delgado's

prior removal. The ICE then issued a decision reinstating the prior order of removal against Delgado, finding that she was removable as an alien who had reentered illegally after having been removed and that she was therefore subject to reinstatement of the prior order of removal. This timely petition for review followed.

Delgado challenges the reinstatement of the prior order of removal on the ground that she applied for adjustment of status with the CIS pursuant to INA § 245(i), 8 U.S.C. § 1255(i), on July 11, 2006, a date preceding the issuance of the reinstatement order. Delgado claims that, having filed for adjustment of status prior to the reinstatement, she is entitled to an adjudication of the merits of her application for adjustment of status. She argues that she is eligible to have her status adjusted to that of a lawful permanent resident pursuant to INA § 245(i), 8 U.S.C. § 1255(i), which, by its terms, permits adjustment of status for aliens who have "entered the United States without inspection." INA § 245(i)(1)(A)(i), 8 U.S.C. § 1255(i)(1)(A)(i). Delgado also argues that she is eligible for adjustment of status with a waiver pursuant to 8 C.F.R. § 212.2(e), which, according to Delgado, "cures" her inadmissibility. She asserts that she is entitled to such a waiver.

DISCUSSION

I. Standard of Review

This Court reviews a decision by the ICE interpreting the Immigration and Naturalization Act ("INA") according to the standard set forth in Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.:

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the

> agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue...the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. 837, 842-43 (1984). We also accord Chevron deference to decisions of the Board of Immigration Appeals ("BIA") interpreting the immigration statutes, INS v. Aguirre-Aguirre, 526 U.S. 415, 424-25 (1999) (holding that decisions of the BIA interpreting the INA are entitled to Chevron deference), and we give "substantial deference" to BIA decisions interpreting immigration regulations, Jigme Wangchuck v. Dep't of Homeland Sec., 448 F.3d 524, 528 (2d Cir. 2006).

II. Applicable Law

A. Immigration Statutes and Regulations

1. Adjustment of Status

Pursuant to INA § 245(a), 8 U.S.C. § 1255(a), an alien "who was inspected and admitted or paroled into the United States" may apply to adjust her immigration status to that of lawful permanent resident if the alien is "admissible" to the United States, among other qualifications. In 1994, Congress enacted a provision permitting aliens who entered without inspection to apply for adjustment of status under certain circumstances without leaving the United States. INA § 245(i), 8 U.S.C. § 1255(i); see Act of Aug 26, 1994, Pub. L. No. 103-317, § 506(b), 108 Stat. 1765. Section 1255(i) (the "special adjustment of status provision") provides:

> (i) Adjustment of status of certain aliens physically present in United States
>
> > (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States -
> >
> > (A) who -
> >
> > (i) entered the United States without inspection...
> >
> > may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

In order to be eligible for adjustment of status under that provision, an alien who entered without inspection must: (i) have an immigrant visa "immediately available," INA § 245(i)(1)(B), 8 U.S.C. § 1255(i)(1)(B); and (ii) be otherwise "admissible" to the United States for permanent residence, INA § 245(i)(2)(A), 8 U.S.C. § 1255(i)(2)(A).

2. Inadmissible Aliens

A separate provision of the INA sets forth categories of aliens, who, "[e]xcept as otherwise provided in" the INA, are "ineligible to be admitted to the United States." INA § 212(a), 8 U.S.C. § 1182(a). Among the categories of aliens deemed inadmissible are those aliens who "enter[] or attempt[] to reenter the United States without being admitted" and who have previously been "ordered removed." INA § 212(a)(9)(C)(i)(II), 8 U.S.C. § 1182(a)(9)(C)(i)(II). Section 1182(a)(9)(C)(i)(II) provides a lifetime bar on admission, subject to a discretionary waiver by the Secretary of Homeland Security permitting an alien to reapply for admission from abroad after at least ten years have elapsed

since the alien's latest departure from the United States. This "consent to reapply" exception provides that:

> [The permanent bar to admissibility] shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

INA § 212(a)(9)(C)(ii), 8 U.S.C. § 1182(a)(9)(C)(ii).

3. Reinstatement Orders

INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (the "reinstatement provision") provides that:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

4. Waivers of Inadmissibility

8 C.F.R. § 212.2(e) provides:

> Applicant for adjustment of status. An applicant for adjustment of status under section 245 of the Act [8 U.S.C. § 1255]...must request permission to

> reapply for entry in conjunction with his or her application for adjustment of status. This request is made by filing an application for permission to reapply, Form I-212, with the district director having jurisdiction over the place where the alien resides. If the application under section 245 of the Act has been initiated, renewed, or is pending in a proceeding before an immigration judge, the district director must refer the Form I-212 to the immigration judge for adjudication.

B. Interpretation of Immigration Statutes by BIA and Federal Courts

At issue in this case is the relationship between INA § 245(i), 8 U.S.C. § 1255(i), permitting discretionary adjustment of status, INA § 212(a)(9)(C)(i)(II), 8 U.S.C. § 212(a)(9)(C)(i)(II), providing that previously removed aliens who reenter the country without permission are inadmissible, and INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) providing for reinstatement of prior orders of removal and barring any relief under the INA for those inadmissible pursuant to section 1182(a)(9)(C)(i)(II). Also at issue is the effect, if any, of 8 C.F.R. § 212.2(e) on these statutes.

1. Whether Delgado May Seek Adjustment of Status Without a Waiver

Delgado argues that she is eligible for adjustment of status pursuant to the special adjustment of status provision, notwithstanding the reinstatement provision, because "[b]y its express language" section 1255(i) is "available to" aliens who enter the United States without inspection. See Pet'r's Br. On Appeal at 8. Delgado argues that the adjustment of status provision "cures" inadmissibility pursuant to § 1182(a)(9)(C)(i)(II).

The government's position is that, although the special adjustment of status provision authorizes aliens who "entered the United States without inspection" to apply for adjustment of status, see INA § 245(i)(1)(A)(i), 8 U.S.C. § 1255(i)(1)(A)(i), such adjustment is limited to aliens who are "admissible to the United States for permanent residence." Id. § 245(i)(2)(A), 8 U.S.C. § 1255(i)(2)(A). According to the government, because Delgado is inadmissible pursuant to INA § 212(a)(9)(c)(i)(II), 8 U.S.C. § 1182(a)(9)(c)(i)(II), she is not eligible for adjustment of status. For the reasons set forth below, we agree with the government that Delgado is not eligible for adjustment of status pursuant to INA § 245(i), 8 U.S.C. § 1255(i).

We are not persuaded by Delgado's reliance on case law holding that the special adjustment of status provision exempts individuals from inadmissibility pursuant to 8 U.S.C. § 1182(a)(9)(c)(i)(I). See Padilla-Caldera v. Gonzales, 453 F.3d 1237 (10th Cir. 2005); Acosta v. Gonzales, 439 F.3d 550 (9th Cir. 2006). Section 1182(a)(9)(c)(i)(I) provides that "any alien who has been unlawfully present in the United States for an aggregate period of more than [one] year" is inadmissible. Padilla-Caldera held that the special adjustment of status provision "trumped" inadmissibility pursuant to section 1182(a)(9)(c)(I) for an alien who had re-entered the United States illegally after having departed at the direction of the INS. Padilla-Caldera is distinct from the case at bar, most notably by the fact that the alien in that case did not violate a removal order – he re-entered the country illegally after having been unlawfully present in the United States for more than one year, not after having been removed from the United States, as Delgado was. The Padilla-Caldera court itself noted the distinction, relying on earlier Tenth Circuit precedent holding that where section 1182(a)(9)(C)(i)(II)

applies, the reinstatement provision also applies, barring aliens inadmissible under 1182(a)(9)(C)(i)(II) from seeking "any relief" under the immigration statutes. 453 F.3d at 1243 (explaining that "[t]he imposition of additional punishment for those inadmissible under 1182(a)(9)(C)(i)(II) – namely 1231(a)(5) [the reinstatement provision], which bars this class of aliens from seeking 'any relief' – makes 1182(a)(9)(C)(i)(II) distinguishable") (citing Berrum-Garcia v. Comfort, 390 F.3d 1158, 1163 (10th Cir. 2004) (alterations added)).[3] Acosta is equally unavailing. Acosta relied on Padilla-Caldera, which, as discussed, distinguished inadmissibility pursuant to section 1182(a)(9)(C)(i)(II) from inadmissibility pursuant to section 1182(a)(9)(C)(i)(I). Acosta also relied on Perez-Gonzalez v. Ashcroft, 379 F.3d 783, 793-95 (9th Cir. 2004), see 439 F.3d at 554 ("Our reasoning in Perez-Gonzalez v. Ashcroft appears to control the issue now before us."), which, as set forth in greater detail below, has been overruled by the Ninth Circuit, see Gonzales v. Dep't of Homeland Sec., 508 F.3d 1227 (9th Cir. 2007).

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[3] Padilla-Caldera is distinguishable on other grounds as well. In that case the alien, Padilla-Caldera, sought relief under the LIFE Act, which temporarily extended to April 30, 2001 permission for illegal entrants to seek adjustment of status from within the United States. The court noted that an important Congressional purpose behind the LIFE Act was "family reunification for illegal entrants and status violators who have otherwise played by the rules." 453 F.3d at 1242 (quoting 146 Cong. Rec. S11263-01 (daily ed. Oct. 27, 2000) (statement of Sen. Hatch)) (emphasis omitted). The court noted that, unlike Padilla-Caldera, aliens inadmissible under 1182(a)(9)(C)(i)(II) have "violate[d] direct court orders," and have therefore not played by the rules. See Padilla-Caldera, 453 F.3d at 1243. The court also considered the fact that Padilla-Caldera "ironically" had departed the United States at the direction of the INS – he departed to apply for a green card after a favorable ruling on a "Petition for Alien Relative" because at the time of such ruling, adjustment of status could only be sought from outside the United States. See Padilla-Caldera, 453 F.3d at 1239.

Delgado concedes that other circuits have held that the special adjustment of status provision does not "cure" inadmissibility pursuant to § 1182(a)(9)(C)(i)(II), to which the reinstatement provision applies. Although this Court has not yet ruled on this issue, five sister circuits have so held. See Lino v. Gonzales, 467 F.3d 1077, 1079 (7th Cir. 2006) ("[The reinstatement provision] plainly precludes a previously removed alien who has illegally reentered the United States from adjusting her status under § 245(i)."); De Sandoval v. U.S. Att'y Gen., 440 F.3d 1276, 1284-85 (11th Cir. 2006); Berrum-Garcia, 390 F.3d at 1163 (holding that once a petitioner's prior removal order has been reinstated, he no longer qualifies for any relief under the INA, regardless of whether his application was filed before or after the reinstatement decision was made); Lattab v. Ashcroft, 384 F.3d 8, 21 (1st Cir. 2004) (holding that "[s]ection 241(a)(5)...bars aliens who have illegally reentered the United States after having previously been deported from applying for relief"); Warner v. Ashcroft, 381 F.3d 534, 540 (6th Cir. 2004) (holding that aliens whose prior orders of removal are reinstated under § 241(a)(5) should not be eligible for relief under § 245(i) because § 241(a)(5) states that aliens who fall under this provision "may not apply for any relief under this chapter"); Flores v. Ashcroft, 354 F.3d 727, 731 (8th Cir. 2003); see also Padilla v. Ashcroft, 334 F.3d 921, 925 (9th Cir. 2003) (holding that an alien who illegally reenters is not eligible for adjustment of status because the reinstatement provision controls).

The government further argues that the BIA has interpreted 8 U.S.C. § 1182(a)(9)(C)(i)(II) in the same way and that the BIA's interpretation is entitled to Chevron deference. See Chevron, 467 U.S. at 842-43; Aguirre-Aguirre, 526 U.S. at 424-25. In Matter of Torres-Garcia, the BIA dismissed an appeal of an IJ's ruling that an alien who had reentered illegally after having been removed – and was

therefore inadmissible pursuant to § 1182(a)(9)(C)(i)(II) – was ineligible for adjustment of status and ineligible for any waiver of that ground of inadmissibility. 23 I. & N. Dec. 866, 867, 877 (B.I.A. 2006). Although Torres-Garcia primarily was concerned with the alien's lack of eligibility for waivers of inadmissibility, we agree with the government that the BIA's position is that an alien inadmissible pursuant to § 1182(a)(9)(C)(i)(II) is ineligible for adjustment of status pursuant to 8 U.S.C. § 1255(i). We now join our sister circuits in holding that an alien who is ruled inadmissible pursuant to 8 U.S.C. § 1182(a)(9)(C)(i)(II), as a result of having reentered this country illegally after having been removed, is ineligible for adjustment of status pursuant to 8 U.S.C. § 1255(i).

2. Whether Adjustment of Status is Available Pursuant to Waiver

An individual who has reentered the United States illegally after having been removed is permanently inadmissible, see 8 U.S.C. § 1182(a)(9)(C)(i)(II), but such an individual may request permission to reapply for admission pursuant to the consent to reapply provision, as described above. See 8 U.S.C. § 1182(a)(9)(C)(ii). Delgado claims that the ten-year waiting period before she may avail herself of the consent to reapply provision is "cured" by 8 C.F.R. § 212.2, entitled "Consent to reapply for admission after deportation, removal or departure at Government expense." The BIA has expressly held, however, that 8 C.F.R. § 212.2 does not operate as a waiver of inadmissibility under 8 U.S.C. § 1182(a)(9), which pertains to "aliens previously removed." Torres-Garcia held:

> As the language, structure, and regulatory history of 8 C.F.R. § 212.2 make clear, the regulation was not promulgated to implement current section 212(a)(9)

> of the Act [8 U.S.C. § 1182(a)(9)]. Instead, it was published in response to significant legislative changes brought about by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 ("IMMACT").

231 I. & N. at 874. Torres-Garcia further provides:

> [W]hile 8 C.F.R. §§ 212.2(e) and (i)(2) authorize aliens who are unlawfully present in the United States to seek permission to reapply for admission retroactively in conjunction with an application for adjustment of status, the very concept of retroactive permission to reapply for admission, i.e., permission requested after unlawful reentry, contradicts the clear language of section 212(a)(9)(C), which in its own right makes unlawful reentry after removal a ground of inadmissibility that can only be waived after the passage of at least 10 years.

Id. at 874-75. Torres-Garcia explained that the consent to reapply provision "clearly specifies the conditions under which waivers of inadmissibility may be granted. It extends no discretion to the Attorney General or the Secretary of Homeland Security to augment those conditions or to create other less restrictive waivers by regulation." Id. at 875. Torres-Garcia explained that waivers for individuals inadmissible pursuant to 8 U.S.C. § 1182(a)(9)(C)(i)(II) are limited to those "'seeking admission more than 10 years after the date of the alien's last departure from the United States." Id. (quoting INA § 212(a)(9)(C)(ii), 8 U.S.C. § 1182(a)(9)(C)(ii)).

Delgado relies on Perez-Gonzalez, which held that 8 C.F.R. § 212.2 permitted an alien who was present in the United States but inadmissible under 8 U.S.C. §

1182(a)(9)(C)(i)(II) to seek retroactive permission to reapply for admission in conjunction with an application for adjustment of status under section the special adjustment of status provision. 379 F.3d at 793-95. Torres-Garcia, however, expressly rejected Perez-Gonzalez. Torres-Garcia held:

> With all due respect, we believe the Ninth Circuit's analysis regarding the availability of a retroactive waiver of the ground of inadmissibility set forth at section 212(a)(9)(C)(i) contradicts the language and purpose of the Act and appears to have proceeded from an understandable, but ultimately incorrect, assumption regarding the applicability of 8 C.F.R. § 212.2

23 I & N. at 873. We decline to adopt the reasoning in Perez-Gonzalez. Moreover, Perez-Gonzalez has been expressly overruled by the Ninth Circuit. See Gonzales, 509 F.3d 1227. Gonzales held that Chevron deference was owed to the agency's interpretation of the statutes as set forth in Torres-Garcia, even though that interpretation differed from prior Ninth Circuit precedent interpreting the immigration statutes. We agree with the Gonzales court and accord Chevron deference to the BIA's holding that an applicant who is inadmissible under subsection (a)(9)(C)(i)(II) is ineligible to apply for adjustment of status from within the United States and is bound by the consent to reapply provision, which requires that he seek permission to reapply for admission from outside of the United States after ten years have passed since his most recent departure from the United States. Id. at 10-11.

Delgado argues Torres-Garcia is not controlling because that case ignores a provision in the Violence Against Women and Department of Justice Reauthorization Act of 2005

("VAWA") that creates a waiver to the bar to admissibility contained in 8 U.S.C. § 1182(a)(9)(C)(ii). At the time Torres-Garcia was decided, section 813(b) of VAWA provided that "[t]he Secretary of Homeland Security, the Attorney General, and the Secretary of State shall continue to have discretion to consent to an alien's reapplication for admission after a previous order of removal, deportation, or exclusion." Pub. L. No. 109-162, 119 Stat. 2960 (enacted Jan. 5, 2006). That provision was removed pursuant to an amendment to VAWA made effective August 12, 2006. See 8 U.S.C. § 1229b. Notwithstanding the effective dates of the VAWA provision relied on by Delgado, we find no relevance of that provision to inadmissibility pursuant to section 1182(a)(9)(C)(i)(II). That provision does not mention section 1182(a)(9)(C)(i)(II) nor can it be read to apply to that section. Section 813(b)(2) also provides that "it is the sense of Congress that [the Secretary of Homeland Security, the Attorney General, and the Secretary of State] should particularly consider exercising this authority in cases under the Violence Against Women Act of 1994...." Delgado does not allege that VAWA or the Violence Against Women Act of 1994 applies to her. We must reject Delgado's argument that the BIA was required to consider a discrete provision of an unrelated statute.

3. Effect of Filing for Adjustment of Status Prior to Issuance of Order of Reinstatement

Delgado argues that she is entitled to adjudication of her application for adjustment of status because she submitted her application prior to the issuance of the order of reinstatement. Delgado again relies on Perez-Gonzalez, 379 F.3d at 795, which prohibited reinstatement proceedings until after adjudication of petitioner's application for adjustment. As has been shown, Perez-Gonzalez is unavailing because it has been overruled by Gonzales, which explained:

> In August 2004, we held that a previously removed alien unlawfully present in the United States was eligible to adjust his status under the special adjustment provision provided that he filed an I-212 waiver application prior to the initiation of reinstatement proceedings, notwithstanding the bar to relief from removal contained in [the] reinstatement provision and inadmissibility provision for previously removed aliens unlawfully present in the United States....We hold today that we are bound by the BIA's interpretation of the applicable statutes in In re Torres-Garcia, even though that interpretation differs from our prior interpretation in Perez-Gonzalez. Pursuant to In re Torres-Garcia, plaintiffs as a matter of law are not eligible to adjust their status because they are ineligible to receive I-212 waivers.

508 F.3d at 1231.

Finally, Delgado reasons that she has applied for adjustment of status "affirmatively" by submitting her application prior to the issuance of the reinstatement order. She argues that 8 U.S.C. § 1231(a)(5), the reinstatement provision, bars only "defensive" applications (i.e. applications submitted in response to a removal order) because the term "relief" "denotes" defensive applications. Delgado has made no showing to support her argument that relief should apply only to "defensive" applications. We believe that the statute itself provides that the bar to relief is prospective and not conditioned upon the issuance of an order reinstating the prior order of removal. The reinstatement provision provides that an alien "is not eligible and may not apply for" any relief under the INA. See INA §

241(a)(5), 8 U.S.C. § 1231(a)(5) (emphasis supplied). We stand with the First Circuit in its interpretation of the statute:

> Section 241(a)(5) [the reinstatement provision] subjects an illegal reentrant to three independent consequences: reinstatement of the prior deportation order, ineligibility for any relief, and removal. Grammatically, section 241(a)(5) does not make ineligibility for relief dependent upon reinstatement of the prior deportation order. And even if it did, section 241(a)(5) expressly makes reinstatement retroactive to the date of the original deportation order.

Lattab, 384 F.3d at 16. Moreover, we consider Delgado's application defensive. At the time she applied for adjustment of status, Delgado had already reentered illegally after having been removed, and accordingly was ineligible for any relief under the immigration statutes. In any event, with the issuance of the reinstatement order, her application ripened into a defensive one and the fact that an application for adjustment of status was on file with the CIS has no effect on the authority of the Attorney General to reinstate her prior order of removal.

CONCLUSION

For the foregoing reasons, the petition for review is denied.

U.S. Department of Homeland Security

Department of Homeland Security
U.S. Citizenship and Immigration Service

ADJUSTMENT OF STATUS UNIT (SECTION 245) · 26 FEDERAL PLAZA · NEW YORK · NEW YORK 10278

October 26, 2006

RE: TENESACA DELGADO, Monica
A 76 838 388

Monica Tenesaca Delgado
4 Nob Hill Drive
Elmsford, NY 10523

DECISION

Ms. Tenesaca Delgado:

On July 11, 2006, you submitted an Application to Register Permanent Residence or Adjust Status on form I-485. Upon consideration, it is ordered that the application for adjustment of status to a permanent resident be denied.

Section 245 of the Immigration and Nationality Act (INA) states, in pertinent part:

> (a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or may be adjusted by the Attorney General, in his discretion and under such

regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

(1) the alien makes an application for such adjustment,
(2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
(3) an immigrant visa is immediately available to him at the time his application is filed.

Service records indicate that you attempted to enter the United States at Houston International Airport via Continental Flight CO 751 on May 5, 1999. Upon inspection by an U.S. Immigration Officer, it was determined that you were an imposter to the returning resident card that you presented in the name of Sandra Tenesaca Delgado (A46 363 888). On May 5, 1999, you were expeditiously removed from the United States pursuant to Section 235(b)(1) of the Act, and a 5-year bar of your return to the United States without the approval of the United States government was enacted.

Within 5 years of removal from the United States, you re-entered the United States at an unknown time and an unknown location without permission from the United States government. On your I-485 Application to Adjust Status, which you filed with the Service on July 11, 2006, you state that you entered the United States without inspection at Texas in December of 2000, less than a year ["a year" is crossed out with the initials "JL" for a handwritten change to "two years"] after you were expeditiously removed from the United States.

You are inadmissible under Section 212(a)(9)(C)(i)(II) of the Immigration and Nationality Act in that you have re-entered the United States without being admitted after you have been ordered removed under Section 235(b)(1) of the Immigration and Nationality Act.

Section 212(a) of the Immigration and Nationality Act states, in pertinent part:

> (9) Aliens previously removed.
>
> (C) Aliens unlawfully present after previous immigration violations.
>
> (i) In general. Any alien who -
>
> (II) has been ordered removed under section 235(b)(I)[1225], section 240 [1229a], or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

Section 212(a)(9)(C) of the Act states, in pertinent part:

> (ii) **Exception**. Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States ***if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission*** (emphasis added). The Attorney General in the Attorney General's discretion may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Attorney General has granted classification under clause (iii), (iv),

or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's –

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

You do not meet the exception contained in Section 212(a)(9)(C)(ii) of the Act because it has not been more than 10 years after the date of your last departure from the United States and you did not seek and acquire permission for admission into the United States before you entered the United States. Although you have applied for permission to reapply for admission into the United States after Deportation or Removal, you applied for that permission on July 11, 2006, more than 5 years after you illegally re-entered the United States after being expeditiously removed in 1999. It is noted that you did not apply for permission to reenter the United States BEFORE you illegally crossed the US-Mexican border in December of 2000. Furthermore, you are not classified as a battered spouse of a United States citizen, the child of a citizen who has lost his/her status within the past 2 years, the spouse of a United States citizen who is a U.S. government employee or member of the uniformed services abroad, the battered spouse of a legal permanent resident, the child of a legal permanent resident who has lost his/her status within the past 2 years, or the spouse of a legal permanent resident who is a U.S. government employee or

member of the uniformed services abroad, so the exception for aliens of those classifications does not apply to you.

Accordingly, the I-212 that you filed on July 11, 2006 is hereby denied.

On July 11, 2006, you also filed an I-601 Application for Waiver of Inadmissibility because, as you stated on Form I-601, "I may be inadmissible under INA Section 212(a)(9)(A)(i)."

You remain inadmissible under Sections 212(a)(9)(C)(i)(II) as an alien who has been ordered removed under section 235(b)(1) and who entered or attempted to enter the United States without being admitted. There exists no waiver for this inadmissibility charge.

Furthermore, you are also inadmissible under Section 212(a)(6)(C)(i) of the INA for willfully misrepresenting a material fact of your identity and your legal status in this country by presenting a returning resident card and passport in the name of Sandra Tenesaca Delgado (A46 363 888) to a United States Immigration Officer upon inspection in Houston, TX.

Section 212(a)(6) of the INA states, in pertinent part:

> (C) **Misrepresentation.-**
> (i) IN GENERAL.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or entry into the United States or other benefit provided under this Act is inadmissible.

As there is no waiver available for your inadmissibility under Section 212(a)(9)(C)(i)(II), the I-601 Application for Waiver that you filed on July 11, 2006 is hereby denied.

Accordingly, you are inadmissible to the United States under Section 212(a)(9)(C)(i)(II) of the Act. Your removal order is hereby reinstated. Your Application to Adjust Status is hereby denied as a matter of law.

This decision may not be appealed. If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. If you have new or additional information that you wish to have considered, you may file a motion to reopen.

Section 103.5 of Title 8 of the Code of Federal Regulations provides, in pertinent part:

> (a) Motions to reopen or reconsider in other than special agricultural worker and legalization cases.-
>
> (1) When filed by affected party-
>
> (i) General. Except where the Board has jurisdiction and as otherwise provided in 8 CFR parts 3, 210, 242 and 245a, when the affected party files a motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision. Motions to reopen or reconsider are not applicable to proceedings described in § 274a.9 of this chapter. Any motion to reconsider an action by the Service filed by an

> applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

A motion to reconsider must state the reasons for reconsideration and be supported by copies of any pertinent law, regulation, or precedent decisions. A motion to reopen must state the new facts to be proved at the reopened proceeding and be supported by documentary evidence. Any motion should be hand-delivered to this office, room 8-800, with the appropriate filing fee of $385.00.

Any employment authorization you have been granted is hereby terminated.

Respectfully,

s/ Mary Ann Gantner
Mary Ann Gantner
Director
U.S. Citizenship and Immigration Services
New York District
JL

PERSONAL SERVICE

Cc: **Bretz & Coven, LLP**
305 Broadway, Suite 100
New York, NY 10007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED MAY 09 2008
Catherine O'Hagan Wolfe Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 9th day of May two thousand and eight,

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Monica Tenesaca Delgado, a/k/a Monica Patricia Tenesaca Delgado,

Petitioner,

v.

Michael B. Mukasey, Attorney General of the United States,

Respondent.

Petitioner, Monica Tenesaca Delgado, having filed a petition for panel rehearing, and for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: s/ Frank Perez
Frank Perez, Deputy Clerk

8 CFR PART 103 – POWERS AND DUTIES; AVAILABILITY OF RECORDS

Sec. 103.2 Applications, petitions, and other documents.

8 C.F.R. § 103.2(a)

(a) Filing.

(1) General. Every application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions (including where an application or petition should be filed) being hereby incorporated into the particular section of the regulations in this chapter requiring its submission. The form must be filed with the appropriate filing fee required by § 103.7. Except as exempted by paragraph (e) of this section, forms which require an applicant, petitioner, sponsor, beneficiary, or other individual to complete Form FD-258, Applicant Card, must also be filed with the service fee for fingerprinting, as required by § 103.7(b)(1), for each individual who requires fingerprinting. Filing fees and fingerprinting service fees are non-refundable and, except as otherwise provided in this chapter, must be paid when the application is filed. (Amended 7/1/94, 59 FR 33903) (Paragraph (a)(1) revised effective 3/29/98; 63 FR 12979)

8 CFR PART 212 – DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

(Note: Part 212 is duplicated in Chapter V, 8 CFR part 1212, 2/28/03; 68 FR 9824)

8 C.F.R. § 212.2, 8 C.F.R. § 1212.2

Sec. 212.2 Consent to reapply for admission after deportation, removal or departure at Government expense.

8 C.F.R. § 212.2(e), 8 C.F.R. § 1212.2(e)

(e) Applicant for adjustment of status. An applicant for adjustment of status under section 245 of the Act and Part 245 of this chapter must request permission to reapply for entry in conjunction with his or her application for adjustment of status. This request is made by filing an application for permission to reapply, Form I-212, with the district director having jurisdiction over the place where the alien resides. If the application under section 245 of the Act has been initiated, renewed, or is pending in a proceeding before an immigration judge, the district director must refer the Form I-212 to the immigration judge for adjudication.

8 C.F.R. § 212.2(i)(2), 8 C.F.R. § 1212.2(i)(2)

(i) Retroactive approval.

(2) If the alien filed Form I-212 in conjunction with an application for adjustment of status under section 245 of the Act, the approval of Form I-212 shall be retroactive to the date on which the alien embarked or reembarked at a place outside the United States.

INA: ACT 212 - GENERAL CLASSES OF ALIENS INELIGIBLE TO RECEIVE VISAS AND INELIGIBLE FOR ADMISSION; WAIVERS OF INADMISSIBILLITY

INA § 212, 8 U.S.C. § 1182

INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A)

(9) ALIENS PREVIOUSLY Removed.

(A) Certain aliens previously removed.-

(i) Arriving aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.-Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception.-Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

INA § 212(a)(9)(C), 8 U.S.C. § 1182(a)(9)(C)

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.-Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the alien's reapplying for admission.

(iii) WAIVER- The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between--

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

INA: ACT 241 - DETENTION AND REMOVAL OF ALIENS ORDERED REMOVED

INA § 241, 8 U.S.C. § 1231

INA § 241(a)(5), 8 U.S.C. § 1231(a)(5)

Sec. 241. (a) Detention, Release, and Removal of Aliens Ordered Removed.-

(5) Reinstatement of removal orders against aliens illegally reentering.-If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

INA: ACT 245 - ADJUSTMENT OF STATUS OF NONIMMIGRANT TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

INA § 245, 8 U.S.C. § 1255

INA § 245(a), 8 U.S.C. § 1255(a)

(a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

(1) the alien makes an application for such adjustment,

(2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and

(3) an immigrant visa is immediately available to him at the time his application is filed.

INA § 245(i), 8 U.S.C. § 1255(i)

(i) (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States--

(A) who--

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 203(d)) of--

(i) a petition for classification under section 204 that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 212(a)(5)(A) that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000; may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling $1,000 as of the date of receipt of the application, but such sum shall not be required from a child under the age of seventeen, or an alien who is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986 at any date, who-

(i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986;

(ii) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and

(iii) applied for benefits under section 301(a) of the Immigration Act of 1990. The sum specified herein shall be in addition to the fee normally

required for the processing of an application under this section; and

(2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if-

(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

(B) an immigrant visa is immediately available to the alien at the time the application is filed.

(3) (A) The portion of each application fee (not to exceed $200) that the Attorney General determines is required to process an application under this section and is remitted to the Attorney General pursuant to paragraphs (1) and (2) of this subsection shall be disposed of by the Attorney General as provided in subsections (m), (n), and (o) of section 286.

(B) Any remaining portion of such fees remitted under such paragraphs shall be deposited by the Attorney General into the Breached Bond/Detention established under section 286(r), except that in the case of fees attributable to applications for a beneficiary with respect to whom a petition for classification, or an application for labor certification, described in paragraph (1)(B) was filed after January 14, 1998, one-half of such remaining portion shall be deposited by the Attorney General

into the Immigration Examinations Fee Account established under section 286(m).

5 U.S.C. § 553

United States Code
Title 5. Government Organization and Employees
Part I. The Agencies Generally
Chapter 5. Administrative Procedure
Subchapter II. Administrative Procedure

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 706

United States Code
Title 5. Government Organization and Employees
Part I. The Agencies Generally
Chapter 7. Judicial Review

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.